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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. REGINALDO RODARTE et al., Defendants and Appellants.	B209233 (Los Angeles County Super. Ct. No. TA088727)

APPEAL from judgments of the Superior Court of Los Angeles County, Gary E. Daigh, Judge. Modified and, as modified, affirmed with directions as to appellants Reginaldo Rodarte and Ricardo Contreras Rodarte. Affirmed as to appellant Rafael Jesus Rodarte, Jr.

Marilyn G. Burkhardt, under appointment by the Court of Appeal, for Defendant and Appellant Reginaldo Rodarte.

Joseph Shipp, under appointment by the Court of Appeal, for Defendant and Appellant Ricardo Contreras Rodarte.

Robert D. Bacon, under appointment by the Court of Appeal, for Defendant and Appellant Rafael Jesus Rodarte, Jr.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Steven E. Mercer and Roberta L. Davis, Deputy Attorneys General, for Plaintiff and Respondent.

Appellants Reginaldo Rodarte, Ricardo Contreras Rodarte, and Rafael Jesus Rodarte, Jr., appeal from the judgments entered following their convictions by jury on count 1 - first degree murder (Pen. Code, § 187)[1] with a lying-in-wait special circumstance (§ 190.2, subd. (a)(15)) and a principal armed with a firearm (§ 12022, subd. (a)(1)), and with, as to Reginaldo Rodarte and Ricardo Contreras Rodarte, personal use of a firearm (§ 12022.53, subd. (b)), personal and intentional discharge of a firearm (§ 12022.53, subd. (c)), and personal and intentional discharge of a firearm causing great bodily injury and death (§ 12022.53, subd. (d)), and on count 2 - attempted willful, deliberate, and premeditated murder (§§ 664, 187) with a principal armed with a firearm (§ 12022, subd. (a)(1)), and with, as to Reginaldo Rodarte and Ricardo Contreras Rodarte, personal use of a firearm (§ 12022.53, subd. (b)), personal and intentional discharge of a firearm (§ 12022.53, subd. (c)), and personal and intentional discharge of a firearm causing great bodily injury (§ 12022.53, subd. (d)), with court findings as to Reginaldo Rodarte and Ricardo Contreras Rodarte that each of them suffered a prior felony conviction (§ 667, subd. (d)).

As to Reginaldo Rodarte and Ricardo Contreras Rodarte, the court sentenced each of them to prison as to count 1 for a term of life without the possibility of parole, said term doubled purportedly pursuant to the "Three Strikes" law, plus 25 years to life pursuant to section 12022.53, subdivision (d), plus one year for the section 12022, subdivision (a)(1) enhancement with, as to count 2, a consecutive term of life with the possibility of parole, with a minimum parole eligibility term of 14 years, plus 25 years to life pursuant to section 12022.53, subdivision (d), plus one year for the section 12022, subdivision (a)(1) enhancement. The court sentenced Rafael Jesus Rodarte, Jr., to prison as to count 1 for life without the possibility of parole, plus one year for the section 12022, subdivision (a)(1) enhancement with, as to count 2, a consecutive term of life with the possibility of parole, plus one year for the section 12022, subdivision (a)(1) enhancement. We modify the judgments as to Reginaldo Rodarte and Ricardo Contreras Rodarte and, as

[1] Unless otherwise indicated, subsequent statutory references are to the Penal Code.

modified, affirm them with directions. We affirm the judgment as to Rafael Jesus Rodarte, Jr.

FACTUAL SUMMARY

1. *People's Evidence.*

a. *The December 24, 2006 Shooting.*

Viewed in accordance with the usual rules on appeal (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established that on December 24, 2006, appellants lived on 72nd Street in Los Angeles County with Mayra Esparza. Esparza, pregnant by Reginaldo,[2] was his girlfriend. On the above date, Reginaldo and Esparza argued. Esparza called her friend Adriana Gutierrez on the phone and told her that Reginaldo had struck Esparza. Gutierrez heard Reginaldo using profanity and telling Esparza to open the door. Reginaldo, continuing to use profanity, asked Esparza who she was talking to, and Esparza replied she was talking to her friend. Reginaldo indicated he did not want Esparza talking to anyone. Gutierrez indicated she would come and get Esparza. Gutierrez subsequently called Michael Avalos (Michael), Esparza's friend.

Michael (the decedent), with friends, arrived at Esparza's location in an Expedition. They stopped and told Esparza to enter the Expedition and they would take her home. Esparza reluctantly complied, indicating she wanted no more problems with Reginaldo. Michael and his friends drove her to Reginaldo's house, and everyone exited the Expedition.

Gutierrez, her brother David, and Brian Estrada, Gutierrez's boyfriend, arrived in Estrada's Chrysler. Most of the males who exited the Expedition and Chrysler had baseball bats and chains. Gutierrez went to appellants' door, asked for Esparza, and a man told her that Esparza had left. After Gutierrez began walking away, she heard the man yell, " 'Reggie, they're calling you.' "

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[2] To avoid confusion, we refer to appellants by their first names.

Gutierrez testified Reginaldo and a male exited the house. Gutierrez also testified, "[t]hat's when they came out, and then I don't know if it was a gun or I don't know what was it." (*Sic*.) Esparza testified she saw Reginaldo and Ricardo go towards a parked Monte Carlo. Gutierrez testified that, after Reginaldo and the male exited the house, Reginaldo yelled at the male, " '[s]hoot at them. Shoot at them.' "

Estrada told Los Angeles County Sheriff's Sergeant Joseph Purcell, an investigator in this case, that Estrada did not see any guns, but Estrada "heard a little pop." Estrada heard a slide of a gun being pulled back, and he told Gutierrez to reenter his Chrysler. Gutierrez testified that Reginaldo and a male whom she thought was Reginaldo's brother entered a Monte Carlo. Gutierrez and Esparza entered the Chrysler and drove away with David and Estrada. Gutierrez testified she saw Ricardo exit the house and go towards the Monte Carlo, and saw the Monte Carlo chase her. Multiple shots were fired at the Chrysler from the Monte Carlo, and a bullet struck the Chrysler's driver's side mirror.

A few days after the shooting, Esparza resumed living with Reginaldo. Reginaldo denied to Esparza that he had chased her. Reginaldo told Esparza that he felt Michael and everyone had disrespected the house of Reginaldo's mother. Reginaldo also said that he felt Esparza had set up his family by calling Michael. Esparza told Purcell that Ricardo was angry. Ricardo was angry about the December 24, 2006 incident and told Esparza, " '[Michael's] gonna die soon.' "

b. *The January 11, 2007 Incident at the Circle K Store.*

About 7:40 p.m. on January 11, 2007, Michael and his brothers, Andrew Avalos (Andrew) and Francisco Avalos (Francisco), went to the Circle K store near their house to get gas. The store was about a block from appellants' house on 72nd Street. Francisco was inside the store when he heard someone say, " 'That's that punk.' " Reginaldo, Ricardo, Esparza, and Ricardo's girlfriend were in the store. Ricardo left the store, and Reginaldo looked out the window and in the direction of Michael. Reginaldo confirmed with Esparza that he was looking at Michael.

Francisco knew about the December 24, 2006 incident, so he watched Reginaldo. Francisco warned Michael to watch Reginaldo, Ricardo, and Esparza. Esparza, aware Francisco had warned Michael, told Reginaldo, " '[i]f you do something to [Michael], you know you're not gonna see me no more.' " Reginaldo replied, " 'Well, you know I wouldn't. I wouldn't hurt you like that.' " Esparza was worried because of things Ricardo had said to her about getting Michael, and because Ricardo had a gun that day at the store.

Reginaldo and Ricardo exited the store. Reginaldo, Ricardo, and their group appeared to be waiting. Ricardo was looking towards Michael while Michael pumped gas. Reginaldo put his hand in his pocket and grabbed at something while looking at Andrew. Andrew thought Reginaldo was grabbing a gun. Esparza told Purcell that on the night of January 11, 2007, Ricardo was carrying a gun at the store. Esparza also told Purcell that Ricardo always had a gun with him, but she denied at trial that she had said this.

Andrew testified he knew Reginaldo from Andrew's neighborhood. Andrew also testified that he and Reginaldo lived four or five blocks from each other, "[l]ike down the street kind of."

c. *The January 12, 2007 Present Offenses.*

Esparza told Purcell that about 9:00 a.m. or 10:00 a.m. on January 12, 2007, appellants left the 72nd Street house in "the truck."[3] On the morning of January 12, 2007, Michael and Andrew walked to a liquor store at Garfield and Alondra in Paramount. While walking on Garfield, the two made eye contact with three males, including Reginaldo, who were in a truck. The truck was across the street in a gas station, and Reginaldo was a passenger. Andrew recognized the truck, a black four-door Dodge Ram truck. He had seen it in front of Reginaldo's house previously. Photographs taken by the gas station's video camera about 11:35 a.m. appear to depict the truck (with decals known to be on Rafael's truck) travelling through the gas station. The truck

[3] Esparza denied at trial that Ricardo had left.

was registered to Rafael. After Andrew and Michael saw the truck, they entered the store.

Andrew and Michael were in the store about two minutes, continuing to look out the window and make eye contact with the occupants of the truck. The store owner, Roy Cota, told Andrew that the people in the truck were staring at Andrew and Michael. Andrew and Michael were afraid. Cota told Andrew to stay in the store. The truck exited the gas station and turned west onto Alondra.

Andrew and Michael, worried, left the liquor store, intending to walk home quickly. They walked southbound on Garfield, then westbound on the north side of Marcelle. As Andrew and Michael continued walking on the north side of Marcelle, they approached an alley that ran north and south. Purcell walked the same route and it took him a minute and forty seconds to walk from the liquor store to the alley.

When Andrew and Michael reached the entrance to the alley, Andrew saw the truck again. It was parked across the street in the alley on the south side of Marcelle. Andrew testified he "noticed the truck was waiting, like sitting there waiting in the alley[.]" Because of a wall, Andrew had been unable to see the truck until he could see down the entire alley on the south side of the street.

Purcell testified that, starting at Alondra and Garfield, he drove on westbound Alondra, "the way we heard testimony that the truck went," to the area of the alley "where the testimony is that the truck was waiting[.]" In particular, he drove west on Alondra, south on Gundry, east on Jackson, then "north on the alley into the alley on Marcelle." It took him two minutes to drive the entire distance.

When Andrew saw the truck, he said to Michael, " 'That was the truck.' " The truck suddenly moved quickly towards Andrew and Michael. The truck crossed Marcelle and approached Andrew and Michael at the entrance to the alley on the north side of Marcelle. The truck stopped about 18 feet from Andrew and Michael, who stood still.

Ricardo exited the right rear side of the truck and walked towards Andrew and Michael with a gun in Ricardo's hand. When Ricardo was about 15 feet from Andrew and Michael, Ricardo pointed the gun at them while walking towards them. Andrew and

Michael fled northbound into the alley, and Ricardo fired shots at them. Andrew, hit twice in the leg, fell in the alley. Andrew saw Ricardo shooting Michael about three times while Michael was on the ground in the alley. As Ricardo moved into the alley while shooting Andrew and Michael, Rafael drove the truck alongside Ricardo. Once Andrew and Michael were on the ground in the alley, Michael was slightly southeast of Andrew and near the sidewalk, and Andrew and Michael remained in their respective locations during the rest of the incident.

Andrew told Ricardo to stop shooting at Michael. Ricardo shot Andrew. Ricardo reentered the right rear side of the truck. Andrew asked Michael if he was okay, and Michael indicated he was. Andrew and Michael yelled towards the truck that they did not want any problems.

Ricardo again exited the truck. Michael was lying on his side about seven feet from Andrew. Ricardo approached Michael, stood over him, and shot Michael two or three times in the head. Reginaldo was seated in the front passenger seat of the truck. The front passenger window was open, but the rear passenger window was closed. Reginaldo was laughing before, during, and after these shots. Andrew told Ricardo to leave Michael alone. Ricardo fired multiple shots at Andrew, hitting him in the chest and left hand.

Ricardo reentered the truck, and Rafael began driving away northbound in the alley. Andrew turned onto his side and tried to crawl. Reginaldo, still the front seat passenger, pointed a gun out the truck's front passenger window. Andrew tried to slide towards Michael. Reginaldo shot at Andrew while the truck was northwest of him. Andrew tried to cover his head, and was shot three times in the back. Rafael drove the truck out of the alley.[4]

[4] David Virrey, who lived nearby, and Connie Bradford, an animal control officer, observed portions of the above events.

Michael, mortally wounded (count 1), suffered seven gunshot wounds, six of which entered his body from behind. Two of Michael's seven gunshot wounds, i.e., a wound to the back of his head and a wound to his lower left back, were independently fatal. The gunshot wound to Michael's head was consistent with someone having shot Michael while straddling him when he was lying on the ground. The gunshot wound to Michael's lower left back was consistent with, inter alia, someone having shot at Michael from a distance while he was lying on the ground. Michael died about an hour or so after the shooting. Andrew suffered about seven gunshot wounds (count 2). A deputy's incident report indicated the shooting incident occurred about 11:40 a.m., and the call went out at 11:44 a.m.

Fifteen expended nine-millimeter Luger casings were found at the crime scene, and all were fired from the same semiautomatic firearm. Thirteen bullets were recovered: seven in the alley, one in a shelf in a garage along the alley, four from Michael's body, and one from Andrew's leg. The casings were not fired from the gun later found, as discussed *infra*, in the Monte Carlo.

On January 12, 2007, after the shooting, Reginaldo, Rafael, and appellants' father were at home. They kept looking out the window of the house, apparently concerned about police arriving. At one point, Ricardo called Reginaldo, and Esparza overheard them talking. Ricardo asked Reginaldo whether police were in the area, and Reginaldo replied they were. Ricardo laughed about the fact that someone may have died on Jackson Street.

Esparza told Purcell that, on the day after the shooting, appellants' family moved from 72nd Street to Orange County. Reginaldo told Esparza they were moving because of family problems, but Esparza suggested to Reginaldo that she did not believe him. A few days after the shooting, Esparza told Purcell that, after the shooting, Esparza told Ricardo about an occasion when Andrew had held her hand while she received a tattoo. Ricardo replied, " '[t]hat won't happen no more.' " Esparza testified at trial that Reginaldo, not Ricardo, so replied.

On January 17, 2007, Rafael was driving the Monte Carlo when he was stopped in Orange County. The Monte Carlo's hood had a bullet mark caused by a bullet traveling forward after having been fired from a gun held outside the driver's side window by someone sitting in the driver's seat. A box of Winchester nine-millimeter Luger bullets, a black plastic gun case, and a nine-millimeter gun were found in the trunk of the Monte Carlo.

Appellants were arrested in Orange County on January 17, 2007. A box containing nine-millimeter bullets was found during a search of appellants' Orange County residence. The ammunition was the same brand as that found in the Monte Carlo and the same brand as 14 of the 15 casings found in the alley. Two other firearms and another box of ammunition were found in the residence. During a search of appellants' 72nd Street residence, a black plastic shotgun case containing a shotgun was found, as well as four boxes of shotgun ammunition. All of the guns recovered in this case were legally registered to Rafael.

The right rear area of the truck tested positive for gunshot residue, but the front passenger seat tested negative. A Los Angeles County Sheriff's Department senior criminalist opined at trial that the above results were consistent with the following scenario: a right rear passenger, armed with a gun, exited the truck, walked outside, repeatedly fired the gun, reentered the right rear passenger seat for a short period, exited, fired more shots, returned to the right rear passenger seat, then gave the gun to the front passenger, who fired shots out the window and returned the gun to the right rear passenger.

After Rafael was arrested, Purcell interviewed him. Rafael told Purcell that, on January 12, 2007, Rafael owned a Dodge Ram truck. Rafael initially denied to Purcell that, on the above date, Rafael drove the truck. Purcell told Rafael that Purcell had information that Rafael had been in the truck. Rafael then admitted he had driven the truck. Rafael initially denied to Purcell that, on January 12, 2007, Rafael had gone to the gas station. Purcell told Rafael that Purcell had information that Rafael had gone to the station. Rafael then told Purcell that Rafael had gone to the station to buy gasoline.

Purcell told Rafael that Purcell had information that Rafael had not gone to the station to buy gasoline, and Purcell showed Rafael a photograph taken from the gas station video camera. Rafael then told Purcell that Rafael drove into the driveway of the station, drove around the pumps, then drove out the driveway.

Rafael told Purcell that Rafael went to Alondra and Garfield, then went west on Alondra. Rafael denied that he had been looking at people at the liquor store across the street and denied he was in the alley south of Marcelle. Rafael denied remembering that he drove up the alley. Rafael said that on January 12, 2007, he drove by a school on Jackson at the south end of the alley. Rafael claimed he was going to his house, and indicated he had gone to a bank.[5]

Esparza testified Ricardo did not threaten her, but she acknowledged telling Purcell that Ricardo had threatened her. Esparza testified she had made a false statement(s) to Purcell because Purcell was going to take her baby. Esparza also testified that before she spoke to Purcell, Andrew threatened her life and the life of her babies and, according to Esparza, this accounted for some of her statements to Purcell. She further testified that Andrew and an accomplice assaulted and threatened her on August 11, 2007. Andrew denied this. At the time of the trial, Esparza still loved Reginaldo. She did not want to see him convicted.

On January 12, 2007, Andrew identified Reginaldo to police by name, described him, and told police where Reginaldo lived. Within a week of the January 12, 2007 shootings, Andrew identified Reginaldo and Ricardo from photographic lineups and identified a photograph of Rafael as depicting a person who looked like the driver.

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[5] At one point during the interview, the following occurred: "Purcell: . . . you drove up that alley. [¶] [Rafael]: Not from the street." After Purcell discussed with Rafael how he ultimately drove away, the following occurred: "Purcell: . . . you know you've been caught right now. [¶] . . . [¶] Purcell: You know, . . . this [is] bad for you, right? We can make it better. Tell us what happened. [¶] [Rafael]: Sorry, I don't know what you're talking about, sir. [¶] Purcell: But you just nodded your head yes you know you've been caught, right? [¶] [Rafael]: Yeah, I know I've been caught but I - [¶] Purcell: Yeah. [¶] [Rafael]: - don't know for what."

Andrew also identified appellants at their preliminary hearings. At trial, Andrew positively identified Ricardo as the person who shot Andrew and Michael, positively identified Reginaldo as the front seat passenger, and positively identified Rafael as the truck's driver.

2. *Defense Evidence.*

In defense, Reginaldo presented photographs of the liquor store and gas station as evidence that Andrew, Michael, and Cota could not have seen the occupants of Rafael's truck looking at them. A toxicology examination of Michael revealed low levels of amphetamine and methamphetamine in the blood in his heart. Prior to the examination, these levels had been diluted by fluids which Michael had received while hospitalized. Michael had ingested methamphetamine within four to five hours before his death. Methamphetamine can cause paranoia or, in severe cases, hallucinations. A methamphetamine "high" would last four to five hours. Methamphetamine in Michael's liver suggested he was a drug user. Ricardo and Rafael presented no defense evidence.

CONTENTIONS

Appellant(s) make the following claims: (1) Ricardo and Reginaldo claim the trial court erred by admitting in evidence Rafael's statement to Purcell, (2) appellants claim there was insufficient evidence supporting the lying-in-wait special-circumstance findings, (3) appellants claim there was insufficient evidence the murder was committed by lying-in-wait, (4) appellants claim there was insufficient evidence the murder was willful, deliberate, and premeditated, (5) Reginaldo claims there was insufficient evidence supporting the firearm enhancement findings as to count 1, (6) appellants claim the trial court erred by giving a modified CALCRIM No. 728 concerning the lying-in-wait special-circumstance allegation, (7) appellants claim the trial court erred by giving a modified CALCRIM No. 375 concerning uncharged offenses, (8) Reginaldo and Ricardo claim the trial court erred by failing to give a cautionary instruction regarding their oral admissions, (9) appellants claim the trial court erred by giving CALCRIM No. 220 concerning reasonable doubt, and by giving other related instructions, (10) appellants claim the trial court erred by giving CALCRIM Nos. 521 and 601 concerning

premeditation, (11) appellants claim the lying-in-wait special circumstance was unconstitutionally applied to them, (12) Reginaldo and Ricardo claim the section 12022, subdivision (a)(1) enhancements must be stricken, (13) Reginaldo and Ricardo claim the trial court erred by doubling their respective terms of life without the possibility of parole as to count 1, (14) appellants claim the trial court erred by imposing former section 1202.45 parole revocation fines, and (15) Reginaldo and Ricardo claim cumulative prejudicial trial error occurred.

DISCUSSION

1. *The Admission in Evidence of Rafael's Statement to Purcell Was Proper.*

a. *Pertinent Facts.*

On April 21, 2008, prior to trial, the prosecutor filed a motion to introduce into evidence Rafael's statement to Purcell. The motion indicated the statement had been redacted to comply with the *Bruton*/*Aranda*[6] rule, and the statement was attached to the motion. At the April 24, 2008 proceedings on the motion, the court indicated the prosecutor had done a "pretty good job" of redacting the statement so as not to implicate Ricardo or Reginaldo. The court indicated it was willing to consider additional redactions from Reginaldo, including redaction of the statement's references to the word "we." Reginaldo's counsel commented that "as the court is indicating, aside from the 'we's,' I would agree [the prosecutor] did a good job[.]" The court concluded the statement did not violate the *Bruton*/*Aranda* rule. Ricardo subsequently complained the statement could not be redacted to avoid violating the rule. The court told Reginaldo to provide a list of any additional objectionable portions of the statement.

After the jury was sworn, the prosecutor and Reginaldo indicated they had agreed to further redactions as reflected in a final redacted statement. The final redacted statement was admitted into evidence subject to the *Bruton*/*Aranda* objections of Ricardo and Reginaldo, and the pertinent portions of that statement are set forth in the Factual

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[6] *People v. Aranda* (1965) 63 Cal.2d 518; *Bruton v. United States* (1968) 391 U.S. 123, [20 L.Ed.2d 476].

Summary. During its final charge to the jury, the court, using CALCRIM No. 305, instructed "[y]ou have heard evidence that defendant Rafael Rodarte, Jr. made a statement out of court. You may consider that evidence only against him, not against any other defendant."

b. *Analysis*.

Ricardo claims the admission in evidence of the final redacted statement violated the *Bruton*/*Aranda* rule. Ricardo argues "[b]ecause the limiting instruction was insufficient and the redacted statement inexorably identified Rafael's brothers as perpetrators in the truck, admission of the unreliable and untested statement denied [Ricardo]" his federal and state constitutional rights to due process, a fair trial, and confrontation. Ricardo also claims the statement violated *Crawford v. Washington* (2004) 541 U.S. 36 [158 L.Ed.2d 177] (*Crawford*). Ricardo further claims that if he was required to request further redactions to preserve his issues on appeal, he received ineffective assistance of counsel by his trial counsel's failure to make those requests. Reginaldo joins in these claims.

First, to the extent Ricardo and Reginaldo claim a violation of *Crawford* occurred, the claim is unavailing since it is not addressed in a separate heading in the briefs. (Cf. *People v. Baniqued* (2000) 85 Cal.App.4th 13, 29; *In re Keisha T.* (1995) 38 Cal.App.4th 220, 237, fn. 7) and the issue is raised in perfunctory fashion without argument. (Cf. *People v. Jones* (1998) 17 Cal.4th 279, 305.) Ricardo and Reginaldo therefore waived the issue.

As to the merits, the *Bruton*/*Aranda* rule is that the admission in evidence, against a nontestifying codefendant, of said codefendant's confession which also facially incriminates, and is inadmissible hearsay as to, a defendant, violates the latter's right to confrontation when the confession is admitted in evidence at their joint jury trial. (*People v. Aranda*, *supra*, 63 Cal.2d at pp. 528-531; *Bruton v. United States*, *supra*, 391 U.S. at pp. 124-128, fn. 3, 129-136.) If a statement is not facially incriminating, it does not violate the *Bruton/Aranda* rule, and the fact that the statement becomes incriminating when considered with other evidence received at trial does not change that

result. (*People v. Fletcher* (1996) 13 Cal.4th 451, 463 (*Fletcher*); *Richardson v. Marsh* (1987) 481 U.S. 200, 208 [95 L.Ed.2d 176] (*Richardson*).) The *Bruton*/*Aranda* rule applies not only to confessions but to incriminating statements not amounting to confessions. (*People v. Anderson* (1987) 43 Cal.3d 1104, 1123.)

In *Richardson*, the confession at issue was "redacted to omit all reference to [the defendant] -- indeed, to omit all indication that *anyone* other than [the codefendant and a named person other than said defendant] participated in the crime." (*Richardson*, *supra*, 481 U.S. at p. 203.) The high court held that "the Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession with a proper limiting instruction when, as here, the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence." (*Richardson*, *supra*, 481 U.S. at p. 211.)

In the present case, we have set forth in our Factual Summary the pertinent portions of Rafael's statement admitted in evidence. It did not identify Ricardo or Reginaldo by name, did not suggest their existence, did not employ pronouns, symbols, or nonidentifying terms to refer to Ricardo or Reginaldo, and, in fact, did not suggest the existence of any coparticipant of Rafael in the crimes.[7] Reginaldo agreed with the trial court that, aside from the references to "we" in the statement, the prosecutor did a good job redacting it. Reginaldo did not later assert below, and does not assert here, that the issue of the references to "we" was not resolved as part of the process leading to the agreed-upon final redacted statement. The court gave the jury a proper limiting

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[7] Ricardo and Reginaldo argue two colloquies in Rafael's statement were facially incriminating as to Ricardo and Reginaldo. During the first, the following occurred: "Purcell: . . . Where'd you drive with in your, in your truck - [¶] [Rafael]: _____. [¶] Purcell: - Friday morning? [¶] [Rafael]: Well I drove the _____ car. [¶] Purcell: Uh, no, Friday morning you were in your truck. Who – you were in your truck, right? [¶] [Rafael]: No, I was in the car. [¶] [Redacted][.]" During the second, the following occurred: "[Purcell:] . . . we're offering you the opportunity to explain to us what you saw and maybe how you felt about that. We don't know how you felt about it but we have, I have a belief, I'm sure my partner has the same belief, about what your feeling was about that and maybe the surprise that . . . came to you when it happened and why we should believe you." We reject the argument.

instruction. The admission in evidence of Rafael's statement did not violate the right of confrontation of Ricardo or Reginaldo (cf. *Fletcher, supra*, 13 Cal.4th at pp. 455-466; *Richardson, supra*, 481 U.S. at p. 211), or violate their constitutional rights to due process or to a fair trial.

Nor did the admission of the final redacted statement violate *Crawford*. *Crawford* addressed the introduction of testimonial hearsay statements against a defendant. Rafael's final redacted statement contained no evidence against defendant Ricardo or defendant Reginaldo. The statement therefore did not violate the confrontation clause. (*People v. Stevens* (2007) 41 Cal.4th 182, 199.) Finally, Ricardo and Reginaldo did not receive ineffective assistance of counsel to the extent their respective counsel were required to request further redactions and failed to do so. Further redactions were not required since the final redacted statement did not violate the *Bruton*/*Aranda* rule. Ricardo and Reginaldo have failed to demonstrate ineffective assistance of counsel. (Cf. *People v. Ledesma* (1987) 43 Cal.3d 171, 217-218.)

2. *Sufficient Evidence Supported the Lying-in-Wait Special-Circumstance Findings.*

Appellants claim there is insufficient evidence supporting the lying-in-wait special-circumstance findings pertaining to count 1. We disagree.

The court, using a modified CALCRIM No. 728, instructed the jury on the lying-in-wait special-circumstance allegation,[8] and this instruction correctly set forth the

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[8] The written modified CALCRIM No. 728 read: "[t]he defendant is charged with the special circumstance of murder committed by means of lying in wait in violation of Penal Code section 190.2(a)(15). [¶] To prove that this special circumstance is true, the People must prove that: [¶] 1. The defendant intentionally killed Michael Avalos [¶] AND [¶] 2. The defendant committed the murder by means of lying in wait. [¶] A person commits a murder by means of lying in wait if: [¶] 1. He or she concealed his or her purpose from the person killed; [¶] 2. He or she waited and watched for an opportunity to act; [¶] 3. Then he or she made a surprise attack on the person killed from a position of advantage; [¶] AND [¶] 4. He or she intended to kill the person by taking the person by surprise. [¶] Murder which is immediately preceded by lying in wait is murder committed by means of lying in wait. [¶] The lying in wait does not need to continue for any particular period of time, but its duration must be substantial and must show a state of mind equivalent to deliberation or premeditation. [¶] The defendant

elements and law pertaining to the allegation.[9] Moreover, we have set forth the pertinent facts in our Factual Summary, and there was substantial evidence as follows. Michael and Andrew walked southbound from the store to Marcelle, then walked westbound on the north side of Marcelle. Once on Marcelle, their view of the truck, which contained appellants and had parked in the alley on the south side of Marcelle, was obscured by a fence. The truck was effectively concealed from Michael and Andrew by a wall until they could see down the entire alley south of Marcelle. Andrew testified he "noticed the truck was waiting, like sitting there waiting in the alley[.]" There was no testimony that either victim heard the truck drive up to its parked location in the alley.

Once Andrew saw the truck, he acknowledged it, but it was too late. The truck suddenly moved towards Michael and Andrew, and the shooting started shortly thereafter with Michael and Andrew fleeing down that part of the alley that began on the north side of Marcelle. Appellants essentially ambushed Michael and Andrew. There was sufficient evidence to convince a rational trier of fact, beyond a reasonable doubt, that the lying-in-wait special-circumstance allegation was true. (Cf. *People v. Ochoa, supra,* 6 Cal.4th at p. 1206.)

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acted deliberately if [he] carefully weighed the considerations for and against (his/her) choice and, knowing the consequences, decided to kill. The defendant acted with premeditation if [he] decided to kill before committing the act that caused death. [¶] A person can conceal his or her purpose even if the person killed is aware of the other person's physical presence. [¶] The concealment can be accomplished by ambush or some other secret plan."

[9] Appellants do not dispute that the written modified CALCRIM No. 728 correctly set forth the law except to the extent they claim, as discussed in parts 6 and 11 of our Discussion, that the instruction was erroneous, and unconstitutionally applied to them, respectively. We reject those claims *infra*.

3. *There Was Sufficient Evidence the Murder Was Committed by Lying-In-Wait.*

Appellants claim there is insufficient evidence that the murder of Michael (count 1) was of the first degree based on a lying-in-wait theory. In particular, they argue there was insufficient evidence of the requisite (1) substantial watching and waiting, and (2) concealment of purpose. We reject their claims.

After 2000, the only difference between lying-in-wait as a theory that a murder is of the first degree, and lying-in-wait as a basis for a lying-in-wait special circumstance, is that the latter requires intent to kill. Both kinds of lying-in-wait require (1) substantial watching and waiting,[10] and (2) concealment of purpose. (*People v. Poindexter* (2006) 144 Cal.App.4th 572, 578, fn. 9, 580, fns. 10 & 12, 584-585 (*Poindexter*); *People v. Superior Court* (*Bradway*) (2003) 105 Cal.App.4th 297, 309-310 (*Bradway*).)

We have set forth the pertinent facts in our Factual Summary, and the analysis in part 2 of our Discussion is equally applicable here. We conclude there is sufficient evidence that the murder of Michael was of the first degree based on a lying-in-wait theory. (Cf. *People v. Ochoa*, *supra*, 6 Cal.4th at p. 1206.)

Finally, even if there was insufficient evidence that the murder of Michael was of the first degree based on a lying-in-wait theory, we need not reverse the judgments of appellants. The court instructed, and the case was submitted to, the jury based on that theory, but also on the theory that the murder was of the first degree because it was willful, deliberate, and premeditated.[11] Based on the facts set forth in the Factual

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[10] CALCRIM No. 728 (see fn. 8, *ante*), does not use the phrase "substantial watching and waiting," but effectively conveys that concept by its language that " '[t]he lying in wait does not need to continue for any particular period of time, but *its duration must be substantial and* must show a state of mind equivalent to deliberation or premeditation.' " (*Poindexter*, *supra*, 144 Cal.App.4th at pp. 582-583, fn. 17, 584-585.)

[11] We determine the issue of whether a murder was willful, deliberate, and premeditated under familiar principles. "Willful" means intentional; "deliberate" means arrived at as a result of careful thought and weighing of considerations for and against; and "premeditated" means considered beforehand. (*People v. Perez* (1992) 2 Cal.4th 1117, 1123.) "An intentional killing is premeditated and deliberate if it occurred as the result of preexisting thought and reflection rather than unconsidered or rash impulse.

Summary, we conclude there was sufficient evidence as to count 1 that appellants committed willful, deliberate, and premeditated murder. In particular, even assuming that the substantial watching and waiting required by the lying-in-wait theory of first degree murder began only when appellants parked in the alley, there was overwhelming evidence that premeditation and deliberation by appellants preceded that parking and continued to the time appellants killed Michael. This evidence included evidence of planning activity, motive, and the method of killing. (*People v. Perez*, *supra*, 2 Cal.4th at p. 1125.) The fact, if true, that Rafael may not have participated in the events which occurred prior to January 12, 2007, does not compel a contrary conclusion.

Accordingly, assuming arguendo the insufficiency of the lying-in-wait theory of first degree murder, said insufficiency was merely factual, not legal, and there was sufficient evidence that appellants committed the willful, deliberate, and premeditated murder of Michael. Appellants have therefore failed to demonstrate prejudice, i.e., a reasonable probability that the jury found them guilty solely on the alleged factually unsupported theory of lying-in-wait murder; therefore, we affirm their judgments. (Cf. *People v. Guiton* (1993) 4 Cal.4th 1116, 1129-1130.)

[Citations.] However, the requisite reflection need not span a specific or extended period of time." (*People v. Stitely* (2005) 35 Cal.4th 514, 543.) "[P]remeditation can occur in a brief period of time. 'The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly . . . .' [Citations.]" (*People v. Perez*, *supra*, at p. 1127.) Premeditation and deliberation can thus occur in rapid succession. (*People v. Bloyd* (1987) 43 Cal.3d 333, 348 (*Bloyd*). The act of obtaining a weapon is evidence of planning consistent with a finding of premeditation and deliberation. (*People v. Koontz* (2002) 27 Cal.4th 1041, 1081-1082.) The method of killing alone "can sometimes support a conclusion that the evidence sufficed for a finding of premeditated, deliberate murder." (*People v. Memro* (1995) 11 Cal.4th 786, 863-864.) An execution-style shooting at close range may also establish premeditation and deliberation. (Cf. *Bloyd, supra,* at p. 348.) The assailant's use of a firearm against a defenseless person may show sufficient deliberation. (*People v. Bolin* (1998) 18 Cal.4th 297, 332-333.) Similarly, firing at vital body parts shows preconceived deliberation. (*Ibid.*; *People v. Thomas* (1992) 2 Cal.4th 489, 517-518.)

4. *Sufficient Evidence Supported the Finding the Murder Was of the First Degree Because the Murder Was Willful, Deliberate, and Premeditated.*

Appellants claim there is insufficient evidence that the murder of Michael was of the first degree based on the theory the murder was willful, deliberate, and premeditated. We disagree. Based on the facts set forth in the Factual Summary and our prejudice analysis in part 3 of our Discussion, we conclude there was sufficient evidence to convince a rational trier of fact, beyond a reasonable doubt, that the murder of Michael by appellants was willful, deliberate, and premeditated.

Moreover the case was submitted to the jury on the alternate theory that the murder was of the first degree because it was committed by lying-in-wait. Based on the facts set forth in the Factual Summary, and our analysis in part 3 of our Discussion, we conclude there was sufficient evidence as to count 1 that appellants committed first degree murder by lying-in-wait.

Accordingly, assuming arguendo the insufficiency of the premeditation and deliberation theory of first degree murder, said insufficiency was merely factual, not legal, and there was sufficient evidence that appellants committed the lying-in-wait murder of Michael. Appellants have therefore failed to demonstrate prejudice, i.e., a reasonable probability the jury found them guilty solely on the alleged factually unsupported theory of premeditation and deliberation; therefore, we affirm their judgments. (Cf. *People v. Guiton, supra,* 4 Cal.4th at pp. 1129-1130.)

5. *Sufficient Evidence Supported the Firearm Enhancement Findings As to Reginaldo.*

Reginaldo claims there is insufficient evidence supporting the firearm enhancement findings pertaining to count 1. He presents two arguments. First, as to the section 12022.53, subdivision (d) finding, he concedes he personally discharged a firearm but argues there is insufficient evidence that that discharge proximately caused Michael's death. For the reasons discussed below, we reject that argument.

Reginaldo argues he did not proximately cause Michael's death because it was only after Ricardo fatally shot Michael that Reginaldo fired shots, and that Reginaldo fired only at, and hit only, Andrew. However, we have set forth the pertinent facts in our Factual Summary. Michael suffered two independently fatal gunshot wounds, one in the head, the other in the lower left back. There was evidence the head wound occurred when Ricardo, standing over Michael while Michael was lying on the ground, shot him in the head. There was evidence the back wound occurred when a gunman shot Michael from a distance while Michael was lying on the ground. There is no dispute there is no evidence that anyone other than Reginaldo or Ricardo fired the fatal shot to Michael's back. Based on Andrew's testimony and the People's exhibits admitted in evidence, including the photographs of the January 12, 2007 shooting scene, there was substantial evidence as follows.

At the time Reginaldo was firing from the truck, the truck, Andrew, and Michael were in the alley. The truck was northwest of Andrew and Michael. In particular, the truck was apparently a significant distance northwest of Andrew, but Andrew was only about seven feet north of Michael. At the time, the truck was moving north and away from Andrew and Michael, the two were lying on the ground, and Andrew was trying to slide towards Michael.

Reginaldo concedes he shot at Andrew three times, hitting him each time. However, about 15 casings were found at the scene, i.e., multiple shots were fired. Someone fired the corresponding bullets, and the jury reasonably could have concluded Reginaldo and/or Ricardo fired them. As Reginaldo concedes, Andrew never expressly testified Reginaldo fired only three shots. Reginaldo also concedes the truck was speeding away.

Given the evidence, the jury reasonably could have concluded that even if Reginaldo shot at, and hit, Andrew three times, Reginaldo was shooting a semiautomatic firearm in a southeasterly direction from a vehicle moving northbound a significant distance from Andrew and Michael, who were separated only by a short distance, with the result that Michael was in the line of fire and Reginaldo could have fired an additional

bullet fatally wounding Michael in the lower left back. We note Reginaldo concedes in his reply brief that "it is far more *likely* that Ricardo inflicted the fatal back wound during this episode [i.e., when he first exited the truck, starting shooting at Michael, and then continued shooting at Michael as he followed Michael down the alley and Michael fell] than that [Reginaldo] did it when he shot from the truck." (Italics added.)

"[W]here, as here, more than one assailant discharges a firearm into a group of people and 'it is not possible to determine which assailant inflicted which injuries, the defendant may be punished with a [section 12022.7] great bodily injury enhancement if his conduct was of a nature that it *could* have caused the great bodily injury suffered.' [Citation.]" (*In re Sergio R.* (1991) 228 Cal.App.3d 588, 601-602, italics added; see *People v. Sanchez* (2001) 26 Cal.4th 834, 845, 848-849.) We see no reason not to apply this rationale to section 12022.53, subdivision (d). (Cf. *People v. Bland* (2002) 28 Cal.4th 313, 337-338.) Indeed, Reginaldo effectively concedes this rationale applies to subdivision (d). Imposition of the section 12022.53, subdivision (d) enhancement pertaining to count 1 was proper.[12]

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[12] Reginaldo argues the prosecutor during jury argument urged that only Ricardo shot and killed Michael; therefore, on appeal respondent may not switch theories and argue Reginaldo killed him by shooting him in the lower left back. The prosecutor suggested during jury argument that Ricardo fired the fatal shots at Michael and that Reginaldo fired at Andrew, but the prosecutor never expressly argued Reginaldo did not fire at Michael or that Reginaldo could not have fired the fatal shot to Michael's lower left back. Indeed, at one point during jury argument the prosecutor commented that Reginaldo did a number of things, including "laughing during the crime and shooting one of the victims, *at least* one of the victims." (Italics added.) Respondent has not switched theories. Moreover, on a challenge to the sufficiency of the evidence, "[o]ur power as an appellate court begins and ends with the determination whether, on the entire record, there is substantial evidence, contradicted or uncontradicted, to support the judgment. [Citation.]" (*People v. Hernandez* (1990) 219 Cal.App.3d 1177, 1181-1182.) All of the cases cited by Reginaldo in support of his claim that respondent has impermissibly switched theories are distinguishable from the present case.

Reginaldo's second argument is that, as to the section 12022.53, subdivision (b) finding, there is insufficient evidence that he personally used a firearm "in the commission" (§ 12022.53, subd. (b)) of murder and, as to the subdivision (c) finding, there is insufficient evidence that he personally and intentionally discharged a firearm "in the commission" (§ 12022.53, subd. (c)) of murder. A premise of Reginaldo's argument appears to be that he never used a gun "until *after* Ricardo had inflicted the fatal injuries on Michael and gotten back in the truck and the truck was leaving the scene." We reject the argument.

There was substantial evidence that, even though Michael was fatally shot twice in the alley, he died about an hour later. It is undisputed that if Reginaldo fired the fatal shot to Michael's lower left back and he died about an hour later, Reginaldo fired the shot "in the commission" of murder for purposes of section 12022.53, subdivisions (b) and (c) and is liable under those subdivisions.

As discussed, there was substantial evidence that Reginaldo could have fired the fatal shot to Michael's back. As we have seen, the fact it might not have been possible to prove who (Reginaldo or Ricardo) fired the fatal shot to Michael's back did not immunize Reginaldo from liability under section 12022.53, subdivision (d). The underlying reasoning of that analysis permits a similar conclusion as to subdivisions (b) and (c). Reginaldo is as liable under section 12022.53, subdivisions (b) and (c) as if it could have been proven that he fired the fatal shot to Michael's back. Since Reginaldo is liable for firing that shot before Michael died, Reginaldo is liable under subdivisions (b) and (c).

We reject Reginaldo's claim that there was insufficient evidence supporting the firearm enhancement findings pertaining to count 1 and, to the extent Ricardo and/or Rafael join in Reginaldo's claim, we reject their claims as well.

6. *The Court Did Not Err by Giving the Jury the Modified CALCRIM No. 728 Without Further Modifications.*

a. *Pertinent Facts.*

During discussions regarding proposed jury instructions, Reginaldo asked the court to add the following sentence to CALCRIM No. 728 (the lying-in-wait special-circumstance instruction): "[m]urder which is immediately preceded by lying in wait is murder committed by means of lying in wait." Reginaldo asked that the sentence be added somewhere after the fourth enumerated element in the instruction (see fn. 8, *ante*). Reginaldo indicated he would leave to the court to decide where the sentence would be placed.

The court indicated the proposed sentence could be found in the corresponding CALJIC instruction and, there, the sentence appeared to be an additional element. The court indicated Reginaldo was arguing the proposed sentence was an additional element. The People opposed adding the proposed sentence and suggested, inter alia, the inclusion of the sentence in the corresponding CALJIC instruction might not have reflected changes in the law which occurred in 2000. The court granted Reginaldo's request and added the proposed sentence to CALCRIM No. 728 as previously indicated (see fn. 8, *ante*). Neither Ricardo nor Rafael commented on the above issues.

b. *Analysis.*

Appellants, apparently not satisfied that CALCRIM No. 728 was modified at Reginaldo's request by the addition of the previously quoted sentence, claim the court erred in violation of their rights to due process, a fair trial, and a jury trial by failing to further modify CALCRIM No. 728 to expressly state that an *essential* element of the special circumstance is that the lying-in-wait must immediately precede the murder. We note, as discussed below, that the instruction adequately told the jury that lying-in-wait must immediately precede the murder. Appellants waived the issue by not requesting

further clarification or amplification of the instruction. (Cf. *People v. Richardson* (2008) 43 Cal.4th 959, 1022-1023; *People v. Palmer* (2005) 133 Cal.App.4th 1141, 1156.)[13]

Even if the issue was not waived, the trial court did not err by failing to further modify the instruction. First, "[p]roposition 18, adopted by the voters on March 7, 2000, changed the word 'while' in the lying-in-wait special circumstance to 'by means of' so that it would conform with the lying-in-wait language defining first degree murder to essentially eliminate the immediacy requirement that case law had placed on the special circumstance. [Citations.]" (*Bradway, supra*, 105 Cal.App.4th at p. 307.) The analysis of Proposition 18 by the Legislative Analyst indicated the above change in the lying-in-wait special-circumstance statute would permit what previously had been prohibited as a matter of judicial construction, namely, application of the special circumstance to a case in which the murderer waited for the victim, captured the victim, transported the victim to another location, then committed the murder. (*Ibid.*) The trial court would have erred if it had modified the instruction to include an immediacy requirement as requested by appellants.

Second, the written instruction as given specified two enumerated elements, then stated, "3. *Then* he or she made a surprise attack on the person killed from a position of advantage[.]" (Italics added.) One meaning of the word "then" is "at that time."[14] The third enumerated element adequately told the jury what appellants wanted the instruction to say, i.e., the lying-in-wait must immediately precede the murder; therefore, there was

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[13] In light of this conclusion, there is no need to reach respondent's claim that Reginaldo waived the issue based on the doctrine of invited error.

[14] Merriam-Webster's Collegiate Dictionary (10th ed. 1995) page 1222.

no need to further modify the instruction. (Cf. *People v. Palmer*, *supra*, 133 Cal.App.4th at p. 1156.)[15]

Third, in light of the facts set forth in our Factual Summary and our analysis in part 3 of our Discussion, there was overwhelming evidence that, in the present case, the lying-in-wait immediately preceded the murder. As to Reginaldo in particular, during closing argument he described the third enumerated element as being: "*immediately* thereafter a surprise attack on an unsuspecting victim from a position of advantage." (Italics added.) The alleged instructional error was harmless under any conceivable standard. (Cf. *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*); *Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705] (*Chapman*).)

7. *The Court Did Not Err by Giving the Jury the Modified CALCRIM No. 375.*

The court gave the jury a modified CALCRIM No. 375, concerning evidence of uncharged offenses.[16] The instruction indicated there was evidence that on December 24,

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[15] Footnote 8, *ante*, contains the written modified instruction. The instruction, as orally given, stated the third enumerated element as: "3. *That* he or she made a surprise attack on the person killed from a position of advantage[.]" (Italics added.) The court told the jury they would have the written instructions during deliberations; therefore, we presume they did (Evid. Code, § 664) and that the jury read and followed the written CALCRIM No. 728 instruction. (Cf. *People v. Osband* (1996) 13 Cal.4th 622, 686-687.)

[16] The modified written instruction read: "[t]he People presented evidence that one or more of the defendants committed another offense, *the offense of assault with a firearm on December 24, 2006*, that was not charged in this case. Also, the People presented evidence that one or more of the defendants had a confrontation with Michael Avalos on that date. [¶] You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the uncharged offenses or acts. Proof by a preponderance of the evidence is a different burden of proof than proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true. [¶] If the People have not met this burden, you must disregard this evidence entirely. [¶] If you decide that the defendant committed the (uncharged offense[s]/act[s]), you may, but are not required to, consider that evidence for the limited purpose of deciding whether or not the defendant had a motive to commit the offenses alleged in this case. [¶] *In evaluating this evidence, consider the similarity or lack of similarity between the uncharged offense and act and the charged offenses.* [¶] Do not consider this evidence for any other purpose[.] [¶] Do not conclude from this evidence that the defendant has a bad character

2006, one or more of the appellants committed the uncharged offense of assault with a firearm. The instruction also indicated the jury could consider that evidence only on the issue of motive to commit the present offenses.

Ricardo claims the instruction's reference to assault with a firearm as an uncharged offense was error on the sole ground there was insufficient evidence identifying any of the appellants, especially Ricardo, as the shooter.[17] Ricardo argues the alleged error violated his rights to due process, a fair trial, and a jury trial. Reginaldo and Rafael join the claim. We reject it. There was ample evidence, including that set forth in our recitation in the Factual Summary of the facts regarding the December 24, 2006 shooting, that Reginaldo was an accomplice to Ricardo's shooting of a firearm during their pursuit of the Chrysler when they were in the Monte Carlo.

Moreover, even if the instruction erroneously referred to assault with a firearm, we need not reverse the judgments. Ricardo does not dispute that an assault with a firearm occurred, and does not seek exclusion of the evidence that one or more of the appellants committed that offense. The uncharged offense evidence was highly probative on the issue of motive.

Further, the instruction indicated only that "one" or more defendants committed the uncharged offense. The instruction told the jury to consider the uncharged offense evidence, only on the issue of motive, if the offense was proven by a preponderance of the evidence and, even then, the instruction expressly permitted, but did not require, the jury to consider that evidence. The instruction expressly precluded the jury from

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or is disposed to commit crime. [¶] If you conclude that the defendant committed the uncharged offenses or act, that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of murder or attempted murder. The People must still prove each element of every charge beyond a reasonable doubt." (Italics added.)

[17] Ricardo does not dispute that if there was sufficient evidence that an appellant(s) committed the assault with a firearm, that evidence was relevant and admissible on the issue of motive. He does not expressly seek exclusion of any such evidence.

considering that evidence as propensity evidence, and reiterated the People's burden of proof beyond a reasonable doubt.

Further still, the instruction expressly limited jury consideration of the uncharged offense evidence solely to the issue of the motive of one or more of the appellants, and for the purpose of determining guilt of the substantive offenses of murder and attempted murder. However, the jury did more than merely convict appellants of the substantive offenses. The jury found the murder to be of the first degree based on the theory the murder was committed by lying-in-wait, and/or based on the theory the murder was willful, deliberate, and premeditated. The jury found true the lying-in-wait special-circumstance allegation, and found the attempted murder to be willful, deliberate, and premeditated. The alleged instructional error was harmless under any conceivable standard. (Cf. *Watson, supra*, 46 Cal.2d at p. 836; *Chapman, supra*, 386 U.S. at p. 24.)

Ricardo also claims the trial court erred by giving the following language as part of the modified instruction: "[i]n evaluating this evidence, consider the similarity or lack of similarity between the uncharged offense and act and the charged offenses." Reginaldo and Rafael join in this claim. For the reasons discussed below, we conclude the court did not commit prejudicial error by giving the above quoted language.

There is no dispute the challenged language would have correctly stated the law if the uncharged offense evidence had been admissible to prove, e.g., intent or identity. However, "[w]hen, . . . the mere *fact* of the prior offense gives rise to an inference of motive, similarity of the offenses is irrelevant." (*People v. Pertsoni* (1985) 172 Cal.App.3d 369, 374.) Since the court instructed the jury to consider the uncharged offense evidence on the issue of motive only, we assume arguendo the challenged language in the modified instruction was an irrelevant and inapplicable instruction. The giving of an instruction that is correct as to the law but irrelevant or inapplicable is error. (*People v. Cross* (2008) 45 Cal.4th 58, 67 (*Cross*).)

However, even assuming the court erred by giving the challenged language, we need not reverse the judgments. "[G]iving an irrelevant or inapplicable instruction is generally ' "only a technical error which does not constitute ground for reversal." ' "

(*Cross, supra,* 45 Cal.4th at p. 67.) The challenged language, in pertinent part, merely told the jury to consider certain factors when evaluating the uncharged offense evidence. Effectively, the challenged language told the jury to consider similarity, if any, or lack of similarity, if any. The challenged language did not expressly tell the jury what, if any, inference to draw. The challenged language in the instruction was part of a whole which, as previously discussed, was conditional, permitted but did not require consideration of the uncharged offense evidence, and was expressly limited in scope, and the jury found appellants culpable for more than the mere substantive offenses with which the modified CALCRIM No. 375 was concerned. The alleged instructional error was harmless under any conceivable standard.

8. *Any Instructional Error Regarding Oral Admissions Was Not Prejudicial.*

The court gave a modified CALCRIM No. 358, concerning evidence of a defendant's statements, as follows: "You have heard evidence that the defendant made an oral statement while the court was not in session. You must decide whether or not the defendant made any such statements, in whole or in part. If you decide that the defendant made such a statement, consider the statement, along with all the other evidence, in reaching your verdict. It is up to you to decide how much importance to give to such a statement." The court failed to give, as part of the modified CALCRIM No. 358, the following sentence normally found in that instruction: "[c]onsider with caution any statement made by (the/a) defendant tending to show (his/her) guilt unless the statement was written or otherwise recorded."

Reginaldo and Ricardo claim the above mentioned failure was error in violation of their rights to due process and a fair trial. For reasons discussed below, we conclude no prejudicial error occurred.

The trial court had a duty to give the above quoted sentence sua sponte as to evidence of a defendant's inculpatory out-of-court oral statements. (Cf. *People v. Beagle* (1972) 6 Cal.3d 441, 455-456 (*Beagle*).) We assume arguendo therefore that the trial court's failure to give the above quoted statement was error. However, said failure did

not violate his constitutional rights (*People v. Carpenter* (1997) 15 Cal.4th 312, 393), and any such error is reviewed under the *Watson* standard. (*Ibid*.; *Beagle, supra,* at p. 455.)

We conclude reversal of the judgments of Reginaldo and Ricardo is not warranted. First, the purpose of the cautionary instruction is to assist the jury in determining if a statement was in fact made. (*People v. Bemis* (1949) 33 Cal.2d 395, 400.) The modified CALCRIM No. 358 instruction, as given, advised the jury, "You must decide whether or not the defendant made any such statements, in whole or in part." Second, Reginaldo and Ricardo have failed to demonstrate that this was a case in which the parties presented conflicting evidence as to the precise words used in said appellants' statements, their meaning or context, or whether they were remembered and accurately reported. Said appellants have failed to demonstrate that this is anything other than a case in which the issue, if any, as to their numerous oral statements was whether they made them at all.

Third, there was ample evidence supporting the convictions and the jury's other findings as to Reginaldo and Ricardo even absent their statements; therefore, the alleged instruction error was not prejudicial. (Cf. *People v. Carpenter, supra,* 15 Cal.4th at pp. 392-393; *People v. Bunyard* (1988) 45 Cal.3d 1189, 1224-1225; *Watson, supra,* 46 Cal.2d at p. 836.)

9. *The Court Properly Gave CALCRIM No. 220 and Other Related Instructions.*

The court gave the jury CALCRIM No. 220 on the presumption of innocence and the People's burden of proof beyond a reasonable doubt, and gave other related instructions.[18] Appellants claim CALCRIM No. 220 and the other said instructions erroneously restricted the jury's ability to consider (1) the absence of evidence, and (2) the jury's degree of certainty (including moral certainty). Appellants present the degree of certainty issue "for purposes of exhausting state remedies[.]"

As to appellants' claim concerning the instructions and the absence of evidence, we disagree. The instructions permit the jury to consider both the evidence and the

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[18] The other instructions were CALCRIM Nos. 200 (duties of judge and jury), 222 (evidence), 223 (definition of direct and circumstantial evidence), and 3550 (predeliberation instructions).

absence of evidence. (Cf. *People v. Garelick* (2008) 161 Cal.App.4th 1107, 1117-1119; *People v. Campos* (2007) 156 Cal.App.4th 1228, 1237-1238; *People v. Guerrero* (2007) 155 Cal.App.4th 1264, 1268-1269.) Similarly, we reject appellants' claim concerning the instructions and the jury's degree of certainty. (*People v. Freeman* (1994) 8 Cal.4th 450, 501-504, fn. 9, 505; *People v. Light* (1996) 44 Cal.App.4th 879, 884-889; *People v. Torres* (1996) 43 Cal.App.4th 1073, 1077-1078.)

10. *The Court Properly Instructed on Premeditation.*

The court gave the jury a modified CALCRIM No. 521**,** describing first and second degree murder.[19] The modified CALCRIM No. 521 states, inter alia, "[t]he defendant acted with premeditation if he decided to kill before committing the act that caused death."[20] The court also gave a modified CALCRIM No. 601, describing

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[19] That instruction read, in pertinent part: "[i]f you decide that the defendant has committed murder, you must decide whether it is murder of the first or second degree. [¶] [The defendant has been prosecuted for first degree murder under two theories: (1) 'the murder was willful, deliberate, and premeditated'[; and] (2) 'the murder was committed by lying in wait.' [¶] Each theory of first degree murder has different requirements, and I will instruct you on both. [¶] You may not find the defendant guilty of first degree murder unless all of you agree that the People have proved that the defendant committed murder. But all of you do not need to agree on the same theory.] [¶] [The defendant is guilty of first degree murder if the People have proved that he acted willfully, deliberately, and with premeditation. The defendant acted willfully if he intended to kill. The defendant acted deliberately if he carefully weighed the considerations for and against his choice and, knowing the consequences, decided to kill. *The defendant acted with premeditation if he decided to kill before committing the act that caused death*. [¶] The length of time the person spends considering whether to kill does not alone determine whether the killing is deliberate and premeditated. The amount of time required for deliberation and premeditation may vary from person to person and according to the circumstances. A decision to kill made rashly, impulsively, or without careful consideration is not deliberate and premeditated. On the other hand, a cold, calculated decision to kill can be reached quickly. The test is the extent of the reflection, not the length of time.]" (Italics added.)

[20] This language was set forth in the modified CALCRIM No. 521's instruction on first degree willful, deliberate, and premeditated murder. Substantially similar language was contained in a later portion of the modified CALCRIM No. 521 pertaining to first degree lying-in-wait murder.

attempted deliberate and premeditated murder. Similar to the modified CALCRIM No. 521, the modified CALCRIM No. 601 included the sentence, "defendant . . . premeditated if (he/she) decided to kill before acting."

Rafael claims the above instructions erroneously instruct on premeditation, in violation of his rights to due process and a jury trial. He argues the language "[t]he defendant acted with premeditation if he decided to kill before committing the act that caused death" in the modified CALCRIM No. 521, and the similar language in the modified CALCRIM No. 601, erroneously equate premeditation and intent to kill. Reginaldo and Ricardo join in the claim. For the reasons discussed below, we reject it.

Rafael concedes that CALJIC No. 8.20 was the predecessor of CALCRIM No. 521, and that *People v. Lucero* (1988) 44 Cal.3d 1006, 1021 (*Lucero*), held the former instruction sufficiently defined premeditation. CALJIC No. 8.20 stated, "[t]he word 'premeditated' means considered beforehand." The modified CALCRIM No. 521 contained the word "decided." "Decide implies previous *consideration* of a matter causing doubt, wavering, debate, or controversy[.]"[21] (Some capitalization omitted, italics added.) Accordingly, we view the modified CALCRIM No. 521 as comparable to CALJIC No. 8.20 in this respect, and the modified CALCRIM Nos. 521 and 601 sufficiently define premeditation.

Rafael also argues the last paragraph of the modified CALCRIM No. 521 (as we have quoted that paragraph in footnote 19, *ante*), reinforces the inaccurate impression of the sentence he challenges above, allowing a jury to find that premeditation has occurred within an unreasonably short period with the result premeditation and intent to kill are indistinguishable. However, Rafael concedes the challenged paragraph is substantively the same as that in CALJIC No. 8.20, which, as he also concedes, *Lucero* held sufficiently defined premeditation. Moreover, our Supreme Court repeatedly has concluded that premeditation does not require an extended period of time. (*People v. Halvorsen* (2007) 42 Cal.4th 379, 419; *People v. Manriquez* (2005) 37 Cal.4th 547, 577.)

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[21] Merriam-Webster's Collegiate Dictionary, *supra*, at page 298.

We also note the modified CALCRIM No. 521 expressly states "[a] decision to kill made rashly, impulsively, or *without careful consideration* is not deliberate and premeditated." (Italics added.) The modified CALCRIM Nos. 521 and 601 properly instructed on premeditation.[22]

Further, because we conclude the modified CALCRIM No. 521 correctly stated the law and adequately instructed the jury on the relevant legal principles pertaining to first degree willful, deliberate, and premeditated murder, we necessarily reject Rafael's related claim that, because the modified CALCRIM No. 521's instruction on first degree lying-in-wait murder contained language regarding premeditation substantially similar to that found in the instruction's language regarding first degree willful, deliberate, and premeditated murder, the purported deficiencies in the instruction "infect[ed] the lying-in-wait theory of first-degree murder[.]"

Finally, there was overwhelming evidence that appellants murdered Michael with premeditation. The alleged instructional error was harmless under any conceivable standard. (Cf. *Watson*, *supra*, 46 Cal.2d at p. 836; *Chapman*, *supra*, 386 U.S. at p. 24.)

11. *The Lying-In-Wait Special-Circumstance Finding is Constitutional.*

Appellants claim the lying-in-wait special circumstance was unconstitutionally applied to them because said special circumstance is insufficiently distinguishable from first degree lying-in-wait murder, resulting in a lack of the requisite narrowing of the class of persons eligible for a sentence of life without the possibility of parole. They claim this resulted in a violation of state law premised on the Eighth Amendment, due process vagueness principles, appellants' rights to equal protection and an informed jury

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[22] *Polk v. Sandoval* (9th Cir. 2007) 503 F.3d 903, a decision cited by Rafael and involving Nevada law, does not compel a contrary conclusion since, in that case, the jury instruction indicated that once a murder was premeditated, it was willful, deliberate, and premeditated. Moreover, federal appellate court cases are not binding on this court. (*People v. Figueroa* (1992) 2 Cal.App.4th 1584, 1587.)

determination, article 1, sections 7 and 15 of the California Constitution, and the Fifth, Eighth,[23] and Fourteenth Amendments of the United States Constitution. We disagree.

Unlike lying-in-wait first degree murder, the lying-in-wait special circumstance requires intent to kill. This is a constitutionally sufficient distinction accomplishing the requisite narrowing. (*Bradway, supra*, 105 Cal.App.4th at pp. 304-311; cf. *People v. Morales* (1989) 48 Cal.3d 527, 557.)

12. *The Section 12022, Subdivision (a)(1) Enhancements as to Reginaldo and Ricardo Must Be Imposed, Then Stayed.*

As previously indicated, each of the sentences of Reginaldo and Ricardo as to both counts included not only a section 12022.53, subdivision (d) enhancement of 25 years to life, but a one year section 12022, subdivision (a)(1) enhancement. Respondent concedes that when a court imposes a section 12022.53, subdivision (d) enhancement as to a count, the court must impose, then stay, a section 12022, subdivision (a)(1) enhancement as to that count. (Cf. *People v. Gonzalez* (2008) 43 Cal.4th 1118, 1126-1127, 1130; § 12022.53, subd. (f).) We accept the concession. Contrary to the arguments of Reginaldo and Ricardo, the appropriate remedy is not to strike the section 12022, subdivision (a)(1) enhancements, but to impose, then stay them. (Cf. *People v. Gonzalez, supra*, at pp. 1126-1127, 1130.) We will modify the judgments of Reginaldo and Ricardo accordingly.

13. *The Trial Court Erred by Imposing Doubled Terms of Life Without the Possibility of Parole for Murder as to Reginaldo and Ricardo.*

As previously indicated, each of the sentences of Reginaldo and Ricardo included, as to count 1, a term of life without the possibility of parole, said term doubled purportedly pursuant to the Three Strikes law. Reginaldo and Ricardo claim this was error violative of their right to due process. We agree the trial court erred.

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[23] We assume without deciding that appellants' Eighth Amendment arguments apply in a noncapital case.

The only provision of the Three Strikes law legislation authorizing the doubling of terms is section 667, subdivision (e)(1). That subdivision states: "[i]f a defendant has one prior felony conviction that has been pled and proved, the determinate term or *minimum term* for an indeterminate term shall be twice the term otherwise provided as punishment for the current felony conviction." (Italics added.) An indeterminate sentence means the defendant is sentenced to life imprisonment (*People v. Jefferson* (1999) 21 Cal.4th 86, 92), and a sentence of life with the possibility of parole is an indeterminate sentence. Subdivision (e)(1) expressly refers to the doubling of a minimum term for an indeterminate term, but does not expressly refer to the doubling of an indeterminate term which lacks a minimum term. Accordingly, the Three Strikes law does not authorize the doubling of an indeterminate term which lacks a minimum term. (*People v. Smithson* (2000) 79 Cal.App.4th 480, 502-504; contra, *People v. Hardy* (1999) 73 Cal.App.4th 1429, 1433-1434.) We will modify the judgments of Reginaldo and Ricardo accordingly.

14. *Imposition of Former Section 1202.45 Parole Revocation Fines as to Appellants Was Proper*.

As mentioned, each of appellants' sentences included, as to count 1, a prison term of life without the possibility of parole, and, as to count 2, a consecutive term of life with the possibility of parole, with a minimum parole eligibility term of 14 years. The court imposed on each appellant a $200 section 1202.4, subdivision (b) fine, and a $200 former section 1202.45 parole revocation fine.

Appellants claim the imposition of their respective former section 1202.45[24] parole revocation fines was error violative of their rights to due process because their sentences included a term of life without the possibility of parole. Although appellants' respective sentences included such a term, we reject their claim.

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[24] Former section 1202.45 states, in relevant part, "[i]n every case where a person is convicted of a crime and whose sentence includes a period of parole, the court shall at the time of imposing the restitution fine pursuant to subdivision (b) of Section 1202.4, assess an additional parole revocation restitution fine in the same amount as that imposed pursuant to subdivision (b) of Section 1202.4. This additional parole revocation restitution fine shall be suspended unless the person's parole is revoked."

Former section 1202.45 applies, by its terms, to a defendant "whose sentence includes a period of parole[.]" Each of appellants' sentences included a term of life with the possibility of parole as to count 2. This was an indeterminate sentence with a minimum parole eligibility term. (*People v. Jefferson, supra,* 21 Cal.4th at pp. 92-96.) In *People v. Brasure* (2008) 42 Cal.4th 1037 (a case involving a death sentence and a determinate sentence imposed pursuant to section 1170), our Supreme Court stated, "defendant here is unlikely ever to serve any part of the parole period on his determinate sentence. Nonetheless, such a period was included in his determinate sentence by law and carried with it, also by law, a suspended parole revocation restitution fine. Defendant is in no way prejudiced by assessment of the fine, which will become payable only if he actually does begin serving a period of parole and his parole is revoked." (*People v. Brasure, supra,* at p. 1075.)

We find the above reasoning, which was applicable in *Brasure* because the sentence of the defendant in that case included a determinate term after the service of which the defendant technically could have been placed on parole (notwithstanding a death sentence on another count), is equally applicable to appellants' sentences on count 2 of life with the possibility of parole, which include a minimum term after the service of which appellants technically could be placed on parole (notwithstanding a sentence of life without the possibility of parole on count 1). The trial court did not err, constitutionally or otherwise, by imposing the former section 1202.45 parole revocation fines.[25]

[25] In light of our resolution of appellants' claims, we reject the claims of Reginaldo and Ricardo that cumulative prejudicial trial error occurred.

DISPOSITION

The judgments as to Reginaldo Rodarte and Ricardo Contreras Rodarte are modified by vacating their respective doubled terms of life without the possibility of parole as to count 1, by imposing instead thereof a single term of life without the possibility of parole as to count 1, by vacating the trial court's imposition of the Penal Code section 12022, subdivision (a)(1) enhancements pertaining to counts 1 and 2, and by instead imposing and then staying said enhancements, with the result that each said appellant is sentenced to prison as to count 1 for a term of life without the possibility of parole, plus 25 years to life pursuant to section 12022.53, subdivision (d), with an imposed, and then stayed, section 12022, subdivision (a)(1) enhancement, and with, as to count 2, a consecutive term of life with the possibility of parole, with a minimum parole eligibility term of 14 years, plus 25 years to life pursuant to section 12022.53, subdivision (d), with an imposed, and then stayed, section 12022, subdivision (a)(1) enhancement, and, as so modified, said appellants' respective judgments are affirmed. The trial court is directed to forward to the Department of Corrections an amended abstract of judgment as to Reginaldo Rodarte and Ricardo Contreras Rodarte. The judgment as to Rafael Jesus Rodarte, Jr., is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KITCHING, J.

We concur:

CROSKEY, Acting P. J.

ALDRICH, J.